PD-0812-17
COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

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COURT OF CRIMINAL APPEALS
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JOSHUA GOLLIDAY, APPELLANT	§ § §	
V.	§ §	**NO. PD-0812-17**
THE STATE OF TEXAS, APPELLEE	§ §	

PETITION FOR DISCRETIONARY REVIEW FROM THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS' EN BANC PUBLISHED OPINION IN CASE NUMBER 02-15-00416-CR, IN THE APPEAL FROM CAUSE NUMBER 1379815D, IN THE 371ST JUDICIAL DISTRICT COURT OF TARRANT COUNTY, TEXAS; THE HONORABLE(S) VICKI ISAAKS & MOLLEE WESTFALL, PRESIDING.

STATE'S BRIEF ON THE MERITS

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3. Did the majority opinion contradict this Court's precedent by holding, in the alternative, that Appellant preserved his constitutional complaints about the exclusion of defense evidence with, among other things, a general remark, made during opening statement, and his argument that the victim's testimony from the first voir dire hearing was relevant so the jury could "get the whole picture"? RR. III-95, 153.

4. Did the majority opinion properly deal with Appellant's en masse first offer by plucking out items when the offer contained other material that was inadmissible? RR. III-86-96, 135-42.

5. Did the majority opinion correctly find constitutional violations in the exclusion of defense evidence? RR. III-86-96, 133-42.

IDENTITY OF JUDGE(S), PARTIES AND COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant, Mr. Joshua Golliday.

- The trial judge(s) were the Honorable(s) Vicki Isaaks (visiting judge, presiding at trial) and Mollee Westfall (elected judge of the 371st Judicial District Court).

- Counsel for the State at trial were Tarrant County Assistant Criminal District Attorneys Lucas Allen and Anna Hernandez, 401 W. Belknap Street, Fort Worth, Texas 76196-0201.

- Counsel for the State on appeal in the court of appeals and before this Court is Tarrant County Assistant Criminal District Attorney David M. Curl, 401 W. Belknap Street, Fort Worth, Texas 76196-0201.

- Counsel for Appellant at trial was Kimberly Knapp, 5719 Airport Freeway, Fort Worth, Texas 76117, and Don Hase, 4025 Woodland Park, Suite 100, Arlington, Texas 76013.

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STATEMENT OF THE CASE

THE CHARGE.....SEXUAL ASSAULT
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STATEMENT OF ORAL ARGUMENT

The Court has determined that oral argument will not be permitted in this case.

STATEMENT OF PROCEDURAL HISTORY

A majority of the en banc court of appeals reversed Appellant's conviction based upon the trial court's exclusion of defense evidence. *Golliday v. State*, __ S.W. 3d __, No. 02-15-00416-CR, 2017 WL 3196479 (Tex.App.--Fort Worth July 27, 2017, pet. granted) (op. on reh'g; en banc 5-4) (hereinafter *Golliday*, 2017 WL 3196479). The en banc decision was on the State's Motion for Reconsideration en banc from an earlier panel decision which had also reversed Appellant's conviction. *Golliday v. State*, No. 02-15-00416-CR, 2016 WL 5957022 (Tex.App. -- Fort Worth Oct. 13, 2016) (withdrawn), *reconsideration en banc granted* (December 30, 2016). The withdrawn panel opinion is available as attachment B to the State's Petition for Discretionary Review.

On February 7, 2018, this Court granted discretionary review on the State's five-ground petition. After one extension, the State timely files its merit brief on or before March 26, 2018.

GROUNDS FOR REVIEW

1. Did the majority opinion correctly hold that TEX. R. EVID. 103 trumps TEX. R. APP. P. 33.1 and relieves an appellant of any need to inform the trial court of the legal basis for admitting the evidence proffered? RR. III-86-96, 133-42.

2. Does the majority opinion conflict with precedent from this Court when it holds that an appellate complaint about the exclusion of defense evidence need not comport with the appellant's trial objection? RR. III-95, 141, 153.

3. Did the majority opinion contradict this Court's precedent by holding, in the alternative, that Appellant preserved his constitutional complaints about the exclusion of defense evidence with, among other things, a general remark, made during opening statement, and his argument that the victim's testimony from the first voir dire hearing was relevant so the jury could "get the whole picture"? RR. III-95, 153.

4. Did the majority opinion properly deal with Appellant's en masse first offer by plucking out items when the offer contained other material that was inadmissible? RR. III-86-96, 135-42.

5. Did the majority opinion correctly find constitutional violations in the exclusion of defense evidence? RR. III-86-96, 133-42.

STATEMENT OF FACTS

B.R., the victim in this case, testified that Appellant sexually assaulted her. RR. III-55-60 (after victim told Appellant to leave her apartment, Appellant sexually assaulted her).[1] The victim's testimony was corroborated by:

- Appellant's DNA was obtained from the victim's Sexual Assault Kit, RR. VII-51-52 (SX-35).
- The victim's distraught 9-1-1 call reported the sexual assault in detail and was made as the victim was chasing Appellant. E.g., SX-30 at 7:44 ("He ran as soon as I called the cops and I chased him . . . .") The victim reported Appellant's license plate in her 9-1-1 call as she was pursuing him. Id. at 1:20.

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[1] Appellant was the victim's neighbor, but they barely knew each other before agreeing to make out. SX-30 at 0:48 ("I don't know anything about him . . . ."); RR. III-37 (victim didn't know her neighbors); see also RR. III-174-76 (Appellant's brother testifies that he recognized the victim as a neighbor, but he had never met her).

- The victim's account of what happened to her to the SANE nurse -- made roughly 90 minutes after Appellant sexually assaulted the victim. RR. III-103-06.
- The victim's physical injuries were consistent with sexual assault. RR. III-117-18, 127; SX-21-25; SX-27-28.

Appellant's ultimate defense was that the victim consented. RR. IV-27. This defense was apparently based upon claims that:

(1) the victim's bruises and genital injuries were not conclusive proof of sexual assault, see RR. III-122-30;

(2) the victim had been flirtatious earlier in the evening, see RR. III-196;

(3) Appellant's brother, who was sleeping in a different apartment (after a night of drinking, see RR. III-182-83), had not been awakened by the sound of screaming on the night of the offense, see RR. III-178;

(4) hours after the offense, another man was seen rubbing the victim's leg at the police station, see RR. IV-21; and

(5) the police investigation was allegedly sloppy. RR. IV-23-24.

SUMMARY OF THE ARGUMENT

GROUNDS ONE AND TWO: The en banc majority's holding that Appellant does not need to provide the trial court with a legal justification for the admission of evidence is plainly contrary to this Court's holdings in *Reyna v. State*, 168 S.W.3d 173 (Tex. Crim. App. 2005) and *Anderson v. State*, 301 S.W.3d 276, 280 (Tex. Crim. App. 2009). A legal reality that neither the majority opinion nor Appellant have ever addressed -- let alone dispute. Worse, the opinion reaches this conflict with *Reyna* by construing TEX. R. EVID. 103 to conflict with TEX. R. APP. P. 33.1.

GROUND THREE: The en banc majority's holding that Appellant vague comments and evidentiary objections preserved Appellant's

constitutional complaints on appeal is contrary to this court's suffer-the-consequences rule discussed in *Reyna*. Neither Appellant nor the majority opinion have ever attempted to distinguish the Reyna rule.

GROUND FOUR: Because of the en masse nature of Appellant's first proffer even if Appellant had preserve his constitutional complaints he would be required to show that every part of the first proffer was admissible. The only separately offered part of the first proffer was the victim's alleged comment about "accepting being raped".

GROUND FIVE: The majority's largely unexplained findings of constitutional error cannot withstand scrutiny. Indeed, the opinion in this case can be reasonably cited as standing for the proposition that any evidence that disparages a victim is admissible for impeachment.

ARGUMENT

Appellant's en masse offers and trial objections

Appellant was granted two voir dire hearings at trial. The first hearing involved eight items of evidence listed in the majority opinion related to the sexual-assault victim's psychiatric treatment at Millwood. The first hearing also involved four other items in the en masse offer not discussed by the majority opinion. *See* discussion *infra* at 25-34. The second voir dire hearing concerned the testimony of the Sexual Assault Nurse Examiner (SANE) about (1) statements made to her by the victim and (2) the SANE's ideas about the side effects of medications and the mixing of alcohol with those medications. At the end of each of these voir dire hearings, Appellant made a global objection that all the evidence within the hearing was admissible. RR. III-95 ("this testimony is relevant"); RR. III-141 ("I think that's relevant").[2]

[2] As will be discussed with regard to Grounds Three and Four, there were some other non-constitutional objections.

The en banc majority opinion holdings

The *en banc* majority opinion identifies eight items of evidence from the sexual-assault victim's testimony that Appellant attempted to introduce following the first voir dire hearing. *Golliday*, 2017 WL 3196479, at *8-9. The majority opinion's description of the excluded portions of the SANE's testimony (from the second voir dire hearing) is somewhat vaguer. *Id.* at *9 ("trial court prevented Appellant from cross-examining [SANE] fully"); *id.* at *6 (excluded testimony from SANE "supported Appellant's defense"). Nonetheless, the opinion describes excluded comments by the sexual-assault victim to the SANE, as well as pseudo-expert testimony from the SANE concerning medications.

Among the comments that the majority opinion identifies as preserving constitutional complaints about the earlier exclusions of defense evidence was this portion of Appellant's opening statement:

> [W]hat I want to submit to you, as many of us remember, there's a fellow named Paul Harvey. He used to say, "Now the rest of the story." And that's where we're going.

> And we intend to prove to you . . . that this was not a thorough investigation, that shortcuts were made, that there are witnesses that we're going to bring to you that are going to fill in a lot of the gaps . . . .

RR. III-153 (emphasis added). The majority opinion invokes this opening-statement comment three times in support of its holding that Appellant "effectively communicated" to the trial court his constitutional evidentiary complaints. *Golliday*, 2017 WL 3196479, at *4; *see also id.* at *9, *10.

The majority held that the eight items that it lists from the first proffer were constitutionally required to be admitted. *Id.* at *9. The majority apparently held that everything from the second hearing was constitutionally required to be admitted. *Id.*

Finally, the majority opinion found reversible error under TEX. R. APP. P. 44.2(a)'s constitutional harm standard. *Golliday*, 2017 WL 3196479, at *9-10. This holding relied upon error in the exclusion of all of the evidence referenced in the majority opinion.

Strikingly, the majority opinion was silent in the face of the dissent's insistence that the majority's holding(s) contradicted this Court's decisions in *Reyna v. State*, 168 S.W.3d 173 (Tex. Crim. App. 2005) and *Anderson v. State*, 301 S.W.3d 276, 280 (Tex. Crim. App. 2009). The majority opinion instead erected a strawman by claiming that the dissent "relie[d] on" *Vasquez v. State*, 483 S.W.3d 550 (Tex. Crim. App. 2016). *Golliday*, 2017 WL 3196479, at *3. The majority opinion proceeds to topple the strawman that it erected with the observation that *Vasquez* involved the admission of evidence rather than the exclusion of evidence. *Id.*[3]

[3] *Vasquez* is cited exactly one time by the dissent. *Golliday*, 2017 WL 3196479 at *11 (Livingston, C.J. dissenting). The dissent cites Vasquez for the general proposition of law that preservation of error requires both an explanation of: (1) what a defendant wants; and (2) why he believes he is entitled to it. *Golliday*, 2017 WL 3196479 at *11 (Livingston, C.J. dissenting). The same principle is expressed in the precedent from this Court that the dissent truly relied upon: "The proponent, if he is the losing party on appeal, must have told the judge why the evidence was admissible." *Reyna*, 168 S.W.3d at 177.

The en banc dissent

The dissenters first fault the majority opinion for refusing to comply with binding precedent from this Court (as well as precedential decisions out of their own court) when it relied on TEX. R. EVID. 103 to excuse Appellant from informing the trial court of the legal basis for the admission of the excluded evidence. *Golliday*, 2017 WL 3196479 at *13 (Livingston, C.J., dissenting) ("The court of criminal appeals rejected this exact argument in *Reyna*, 168 S.W.3d at 176-80.").

Next, the dissent tackles the majority opinion's alternative holding that Appellant preserved his constitutional complaint(s) by: (1) alluding, during opening statement, to the defense giving the jury "the rest of the story," RR. III-153; and (2) proffering all of the victim's testimony from the first voir dire hearing so as to give the jury "the whole picture." RR. III-95. The dissent explains that Appellant didn't make constitutional trial objections regarding the exclusion of defense evidence. *Golliday*, 2017 WL 3196479, at *11-12 (Livingston, C.J., dissenting). The dissent

further points out that the majority opinion's alternative holding contravenes TEX. R. APP. P. 33.1(a) and *Reyna*. *Golliday*, 2017 WL 3196479, at *14-15 (Livingston, C.J., dissenting) (discussing *Reyna*'s suffer-the-consequences rule).

The court of appeals' 2018 (seeming) return to compliance with *Reyna*

In February 2018, a panel of the Fort Worth Court of Appeals, without citing *Golliday*,[4] seemingly re-recognized that (1) a legal theory justifying admission of defense evidence must be presented to the trial court; and (2) ambiguous comments from the defense that could represent complaints based upon the Rules of Evidence will not preserve constitutional complaints on appeal. *Merrick v. State*, __ S.W.3d __, No. 02-17-00035-CR, 2018 WL 651375, at *7, 8, 10 (Tex.App.--Fort Worth Feb. 1, 2018, no pet. h.) (finding constitutional error not preserved in the

[4] *Golliday* was pointedly addressed during oral argument in *Merrick*. http://www.txcourts.gov/media/1439645/02-17-035-cr-02-17-036-cr-damian-merrick.mp3.

exclusion of scores of defense items of evidence where constitutional objections were not made at trial).

While *Merrick* marks a return by the Fort Worth Court to upholding controlling preservation standards,[5] *Merrick's* utter failure to mention *Golliday* only serves to ratchet up the uncertainty and confusion. Further, if *Merrick* is read as holding that *Golliday* was wrongly decided then *Merrick* shows a recognition by the court of appeals that the appellant in the present case was mistakenly awarded relief.

The confusion of controlling preservation law that resulted in an award of relief to the appellant in the present case was (assuredly) not the law in the Fort Worth Court before or (seemingly) after *Golliday*. *Compare Smallwood*, 471 S.W.3d at 611 (2015 pre-*Golliday* decision

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[5] Compliance with *Reyna* had been a non-controversial aspect of the jurisprudence of the court of appeals prior to the opinion in the present case. *Smallwood v. State*, 471 S.W.3d 601, 611 (Tex.App.--Fort Worth 2015, pet. ref'd) (op. on reh'g) ("Appellant complains of the exclusion of the testimony of Redmon and Brown concerning their opinions of Complainant's credibility . . . . [Appellant] did not offer their testimony on any constitutional basis. We therefore do not address the constitutional arguments he raises on appeal.").

upholding preservation law) *and Merrick*, 2018 WL 651375, at *7, 8, 10 (2018 post-*Golliday* decision upholding preservation law). Yet, the en banc decision in *Golliday* has not been distinguished or overruled by the Fort Worth Court: It still stands. As will also be shown, the en banc decision in *Golliday* is not only at odds with Fort Worth Court's own precedent, but it is (most glaringly) incompatible with this Court's decisions.

I. GROUNDS ONE AND TWO: *The majority holding that Appellant's complaints on appeal need not comport with the legal theory advanced for their admission at trial is contrary to TEX. R. APP. P. 33.1, and binding precedent.*

The majority opinion holds that TEX. R. EVID. 103(a)(2) relieves an appellant of the need to have informed the trial court of the legal basis for admitting the excluded evidence. *Golliday*, 2017 WL 3196479, at *3-4. This holding effectively repeals Rule 33.1 whenever an appellant's proffered evidence is excluded.

Rule 103(a)(2) addresses offers of proof -- *i.e.*, telling the trial court what evidence a party wishes to introduce. Rule 103 has nothing to do with Rule 33.1's appellate-preservation requirement -- *i.e.*, the duty to inform the trial court why the proffered evidence is admissible.

The theory relied upon by the majority to excuse Appellant from his duty to preserve his complaint has already been squarely considered and rejected by this Court. In *Reyna* this Court held that TEX. R. EVID. 103 does not trump the requirements of TEX. R. APP. P. 33.1:

> We have held, and the Rules of Evidence make clear, that to preserve error in the exclusion of evidence, the proponent is required to make an offer of proof and obtain a ruling. Since Reyna did both these things, he seems to have preserved error.
>
> But a less common notion of error preservation comes into play in this case, although certainly not a novel one. Professors Goode, Wellborn and Sharlot refer to it as "party responsibility." They explain it this way:
>
> > To the question, which party has the responsibility regarding any particular matter, it is infallibly accurate to answer

> with another question: which party is complaining now on appeal? This is because in a real sense both parties are always responsible for the application of any evidence rule to any evidence. Whichever party complains on appeal about the trial judge's action must, at the earliest opportunity, have done everything necessary to bring to the judge's attention the evidence rule in question and its precise and proper application to the evidence in question.
>
> The basis for party responsibility is, among other things, Appellate Rule 33.1. It provides that as a prerequisite to presenting a complaint for appellate review, the record must show that the party "stated the grounds for the ruling that [he] sought from the trial court with sufficient specificity to make the trial court aware of the complaint." So it is not enough to tell the judge that evidence is admissible. The proponent, if he is the losing party on appeal, must have told the judge why the evidence was admissible.

Reyna, 168 S.W.3d at 176-77 (footnotes omitted). *Reyna*'s incompatibility with the holding in the present case -- that Rule 103 trumps Rule 33.1 -- was never mentioned, much less contested, by the majority opinion in the present case. That incompatibility has now been (seemingly) conceded

by the court of appeals' subsequently-issued opinion in *Merrick*, 2018 WL 651375, at *7, 8, 10. Remarkably, Appellant's Reply to the State's Petition for Discretionary Review fails to even acknowledge the existence of *Reyna*. Thus, Appellant effectively concedes the first preservation holding in the present case cannot be defended. See Reply at 2 (parroting the majority opinion's strawman distinction of *Vasquez*).

II. GROUND THREE: *The majority opinion's alternative holding that Appellant preserved a claim of constitutional error in the exclusion of evidence by nonspecific and/or ambiguous comments contradicts Reyna and Rule 33.1.*

The majority alternatively found that Appellant preserved a constitutional complaint about the exclusion of evidence by: (1) the Paul Harvey opening-statement comment; and (2) a legally meaningless reference to "the whole picture." *Golliday*, 2017 WL 3196479, at *4. The majority also asserts that "Appellant's bill preserving error covers more than fifteen pages and includes multiple explanations of grounds for admissibility of the evidence." *Id.* at *9.

A. *Appellant made no constitutional objection at the first voir dire hearing.*

During the first voir dire hearing (RR. III-86-95), Appellant's only legal objection was: "[W]e would submit that all of this testimony is relevant and should come before the jury so the jury can get the whole picture of the situation." RR. III-95 (emphasis added).[6] This objection is even less of a constitutional complaint than the "credibility" objection in *Reyna*, 168 S.W.3d at 179 ("Reyna's reference to 'credibility' could be a reference to either the Rules of Evidence or the Confrontation Clause.").[7]

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[6] In order to transmute a comment about giving the jury "the whole picture" into a constitutional complaint, one would have to start with a heavy presumption that a constitutional complaint was intended. Accordingly, the opinion also violates binding precedent predating *Reyna*. *Wright v. State*, 28 S.W.3d 526, 536 (Tex. Crim. App. 2000) (hearsay and TEX. R. EVID. 107 objections didn't preserve Confrontation Clause complaint).

[7] Appellant arguably accuses this Court of "disingenuous[ness]" when he declares that "[i]t is disingenuous to assert that the trial court did not understand that the Constitution is implicated when cross examination is limited." Reply at 4. *Reyna* found nothing "disingenuous" in not requiring trial courts to guess at what will be done on appeal with a vague trial objection. Further, an assertion that the trial court knows that there is a potential Confrontation Clause issue when cross examination is limited is no argument that every objection to disallowing a question on cross examination asserts a confrontation complaint.

Indeed, Appellant's position -- that a trial court's imputed understanding of the law fills the gap of an inadequate objection -- is a hair's breadth removed from advocating for the abolition of preservation rules entirely. Every general objection in every case could

Further, even if Appellant had made an actual constitutional objection, Appellant would have still had a duty to dispute clear statements from the State and the trial court that interpreted Appellant's objection as being based on the Rules of Evidence. *Merrick*, 2018 WL 651375, at *7 (citing *Resendez v. State*, 306 S.W.3d 308, 315-16 (Tex. Crim. App. 2009)). Appellant's failed to respond to the State's objections that Appellant's first proffer contained hearsay and was not relevant. RR. III-91, 95.

B. *Appellant made no constitutional objection in the second voir dire hearing.*

During the second voir dire hearing -- concerning the SANE examination (RR. III-135-41) -- Appellant's main objection was a contention that the SANE should be permitted to testify about the effects of combining alcohol and Xanax: "I think that's relevant to explaining some of [the sexual-assault victim's] behavior that evening." RR. III-141

be alleged to be sufficient in light of the trial court's imputed knowledge of the law.

(emphasis added). As discussed above (in section A), a relevancy objection does not preserve a constitutional complaint on appeal.

The other non-constitutional objections made during the SANE voir dire hearing were:

- RR. III-131-32 (objection that door was opened to evidence of medication, herpes and anxiety diagnosis: "I think the State has opened the door when they asked [the SANE] about [the sexual assault victim's] past medical history.") (emphasis added);
- RR. III-134 (use of medication and alcohol relevant: "As far as relevance, the Xanax and the Zoloft, if she was taking those on the night that she has already admitted that she had been drinking all day . . . .) (emphasis added);
- RR. IV141 ("And I think that's relevant to explaining some of her behavior that evening.") (emphasis added);
- RR. III-143 ("we believe that that ties directly to where she remembers parts of the evening specifically, but can't remember

other parts") (emphasis added).

Under *Reyna*'s suffer-the-consequences rule, Appellant made objections that could be based upon the Rules of Evidence and he therefore cannot premise constitutional complaints on appeal on those objections. *Reyna*, 168 S.W.3d at 179-80. (Even ignoring the *Reyna* standard it seems implausible that Appellant had constitutional theories in mind; and nearly unimaginable that the State or the trial court understood Appellant to intend constitutional objections.). The opinion in the present case turns *Reyna* on its head by attempting to turn ambiguity into a weapon for Appellant.

As previously noted, Appellant's Reply ignores *Reyna* and thus, does not dispute that his trial objections did not preserve his constitutional complaints on appeal under the Reyna standard. Likewise, the dissent accurately points out that Appellant did not contend in the court of appeals that the statements identified by the majority preserved Appellant's constitutional complaints on appeal.

Golliday, 2017 WL 3196479 at *15 (Livingston, C.J., dissenting) ("Nor has appellant ever argued that the 'get the whole picture' or 'rest of the story' comments raised constitutional complaints.").

C. *Appellant made no constitutional evidentiary objection during his opening statement.*

Appellant's opening statement about (the now deceased radio commentator) Paul Harvey and his "the rest of the story" tag line told the jury what the defense "intend[ed] to prove" (RR. III-153); it wasn't an objection about an earlier evidentiary ruling. The majority opinion's repeated reliance on this remark also ignores the fact that Appellant's opening-statement comment didn't provoke an adverse ruling. RR. III-153; *see Allen v. State*, 473 S.W.3d 426, 442 (Tex.App.--Houston [14th Dist.] 2015) (addressing contention that comment made during bench conference before opening statement preserved evidentiary complaint, appellate court notes that defendant did not seek or obtain a ruling on

evidentiary objection and complaint was thus forfeited), *pet. dism'd*, 517 S.W.3d 111 (Tex. Crim. App. 2017).

III. GROUND FOUR: *Many of the items of evidence forming the majority's basis for reversal regarding the first proffer were commingled with clearly inadmissible evidence in an en masse offer.*

The State argued on appeal that the en-masse nature of Appellant's first proffer meant that Appellant's claims fail if anything in that en masse offer was inadmissible. The only separately offered part of the first proffer was the victim's testimony that it was possible that she told the hospital staff that she hadn't "really completely accepted the fact that [she] had been raped." RR. III-87-88, 95 ("[C]an we at least ask her the question: Did you state that you had not really accepted -- completely accepted the fact that you had been raped?").

Setting aside the accepting-being-raped item, there were four items of evidence in the first proffer that were not addressed in the opinion below that justify the trial court's rejection of the first en masse proffer.

There were also seven evidentiary items identified by the majority from the first bill that were part of an en masse offer.[8] Accordingly, even if Appellant had made a constitutional objection regarding the first bill, none of those seven items could be improperly excluded if there was anything inadmissible in the en masse offer. *Jones v. State*, 843 S.W.2d 487, 492 (Tex. Crim. App. 1992) (where defendant offered grand jury testimony that was partly admissible and partly inadmissible, trial court could exclude all of it without fear of reversal), *overruled on other grounds by Maxwell v. State*, 48 S.W.3d 196 (Tex. Crim. App. 2001).

The "rotten apples" spoiling Appellant's first en masse proffer, that the majority opinion never acknowledged, included:

1. The prosecutor and the defense have access to the victim's psychiatric records. RR. III-87;

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[8] These seven items listed as error in the opinion will be addressed in Ground Five. The main point that the State makes here is that, except for the putative acceptance-of-rape comment, to establish error with regard to the first proffer, all the items had to be admissible in light of Appellant's en masse offer.

2. The victim had a very difficult past. RR. III-90;
3. The victim denied saying that the Navy took the word of her abusive husband over her word. RR. III-89-90; and
4. The victim denied saying that her best friend didn't believe the victim's claim that she was raped. RR. III-91-92.

There is no argument to be made that any of these items were constitutionally required to be admitted. Further, Items Three and Four requested double hearsay (the victim's alleged out-of-court statements about the statements of others[9]) and the majority made no holding that the hearsay rule is unconstitutional. *See Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007) (application of a rule of evidence doesn't offend the constitution unless "a state evidentiary rule categorically and

[9] *See Shafer v. State*, No. 02-10-00496-CR, 2012 WL 745422, at *3-4 (Tex.App.--Fort Worth Mar. 8, 2012, pet. ref'd) (mem. op., not designated for publication) (discussing hearsay bar to attempt to present evidence from defendant's wife that (1) an unnamed CPS worker informed her that (2) allegations of sexual molestation had been made against wife, defendant and their daughter and (3) the children allegedly involved denied abuse in CPS interview).

arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence vital to his defense"); *Shafer*, No. 2012 WL 745422, at *4 ("[W]e do not read *Carroll [v. State*, 916 S.W.2d 494, 501 (Tex. Crim. App. 1996)], to stand for the proposition that the Confrontation Clause mandates the admission of anonymous hearsay through direct examination of a witness for the defense.").

Alleged comment about the Navy's belief concerning the victim's supposed prior allegation of spousal abuse

The victim denied making any accusation to the Navy about her husband. RR. III-90 ("[W]e were together for only six months, and then he left. So the military knew nothing of my husband."). Thus, Appellant failed to prove that there actually was a prior domestic abuse accusation made to the Navy and the trial court thus could not have abused its discretion in excluding the first proffer. *See Lubojasky v. State*, No. 03-10-00780-CR, 2012 WL 5192919, at *7 (Tex.App.--Austin Oct. 19, 2012, pet. ref'd) (mem. op., not designated for publication) (where victim,

during proffer, denied making accusation there was no evidence of a prior accusation before trial court).

Further, in order for a victim to be impeached with a prior accusation there must be a showing that the prior accusation was false. *Lopez v. State*, 18 S.W.3d 220, 226 (Tex. Crim. App. 2000); *Palmer v. State*, 222 S.W.3d 92, 95 (Tex.App.--Houston [14th] Dist.] 2006, pet. ref'd). The Navy's putative disbelief of the victim's alleged prior accusation is not evidence showing that the allegation of domestic abuse was false. *See, e.g.,*

- *O'Kane v. State*, No. 04-16-00526-CR, 2017 WL 3159462, at *5 (Tex.App.--San Antonio July 26, 2017, no pet.) (mem. op., not designated for publication) (affidavits of non-prosecution – that were not in record – did not demonstrate prior accusation was false);
- *Sanchez v. State*, No. 01-14-00809-CR, 2015 WL 7455782, at *6 (Tex.App.--Houston [1st Dist.] Nov. 24, 2015, pet. ref'd) (mem. op.,

not designated for publication) (decision by prosecution not to proceed on prior case did not establish that prior accusation was false);

- *Enriquez v. State*, No. 03-08-00760-CR, 2009 WL 3400988, at *4 (Tex.App.--Austin Oct. 23, 2009, no pet.) (mem. op., not designated for publication) ("fact that charges were dropped or the investigation suspended does not amount to a showing that the allegations were false for the purposes of the *Lopez* test").

Finally, the alleged claim of spousal abuse is so dissimilar from the sexual assault offense in the present case that the trial court could exclude the evidence even if Appellant had shown that (1) the accusation had actually been made; and (2) the accusation was false. *Lopez,* 18 S.W.3d at 225-26 (attempted impeachment properly disallowed where victim's past allegation of physical abuse by her mother had "almost nothing in common" with charged sexual assault offense by defendant); *Hosey v. State*, No. 06-13-00141-CR, 2014 WL 3621796, at *5 (Tex.App.--

Texarkana July 23, 2014, no pet.) (mem. op., not designated for publication) (allegation concerning physical abuse was too dissimilar to charged sex offenses to be admissible, even if allegation had been shown to be false). Appellant never presented a clear description of what the supposed "abusive husband" allegation consisted of. RR. III-89-90. The trial court was entitled to find that even if Appellant had established that an allegation had in fact been made, that there was no showing that it had any similarity to the present case.

Alleged comment about the belief of victim's best friend concerning the victim's outcry in the present case.

Like the alleged accusation to the Navy discussed above, there is no evidence that the victim's friend didn't believe that the victim was sexually assaulted. The victim denied saying this. RR. III-91-92. Additionally, the friend's supposed assessment of the victim's outcry is irrelevant. *See Vazquez v. State*, No. 05-08-00464-CR, 2009 WL 369479, at *2 (Tex.App.--Dallas Feb. 17, 2009, pet. ref'd) (mem. op., not designated

for publication) ("whether or not A.R.'s mother believed the assaults occurred was not relevant to whether A.R. was telling the truth"). It is also not a permitted means to attack a witness's truthfulness under TEX. R. EVID. 608(a) (allowing reputation or opinion testimony about character for truthfulness). *In re T.K.*, No. A149330, 2017 WL 6523594, at *22 (Cal. Ct. App. Dec. 21, 2017) (not designated for publication) ("a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence"). There was also no showing that the friend's supposed assessment of the victim's outcry was rationally based as required by TEX. R. EVID. 701.[10]

[10] Cases differ on whether a lay opinion on the truthfulness of another person's statement or outcry can satisfy the "helpful" requirement of Rule 701. *Compare United States v. Dempsey*, 629 Fed. App'x 223, 227 (3d Cir. 2015) (police officer's opinion that defendant was not truthful in interrogation was properly admitted as lay opinion) *and United States v. Finley*, 477 F.3d 250, 260-62 (5th Cir. 2007) (trial court was not required to redact DEA agents' comments during interrogation expressing disbelief of defendant) *with People v. Melton*, 750 P.2d 741, 758 (Cal. 1988) ("Lay opinion about the veracity of particular statements by another is inadmissible on that issue.") *and State v. Flook*, 199 Wash. App. 1052, 2017 WL 2955539 at *6 (Wash Ct. App. July 11, 2017) ("Lay opinion of the truthfulness of another is not helpful within the meaning of ER 701, because the jury can assess credibility as well or better than the lay witness.").

The California Supreme Court later explained that the problem with the testimony

A defendant is not constitutionally entitled to present evidence of his victim's troubled past.

Why the trial court was constitutionally required to admit evidence that the victim had stated that she was "a giant problem," RR. III-89, is even more mysterious. A defendant has no constitutional right to present evidence that a victim has been "a problem" to others. *State v. Hummel*, 334 A.2d 52, 59 (N.J. App. Div. 1975) (evidence that sexual abuse victim had been a problem child was not constitutionally required to be admitted). Such evidence has no probative value and is also barred by Rule 608(b).

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in *Melton* was that the credibility determination was "speculative" because the credibility evaluation was based only on the statement. *People v. Homick*, 289 P.3d 791, 841 (Cal. 2012) (describing *Melton* as involving a "witness with no personal knowledge of the events"). The Fifth Circuit imposes a somewhat similar predicate requirement. *United States v. Dotson*, 799 F.2d 189, 193-94 (5th Cir. 1986) (it was reversible error for law enforcement agents to testify, without identifying a justification, that defendant and his witnesses were not truthful). These cases establish that at a minimum the person making the credibility evaluation must be able to point to facts supporting their assessment.

Finally, it is worth noting that if the State had attempted to present lay witness testimony that an outcry of abuse was credible the defendant would have a strong argument that the evidence was improper. *Ramirez v. State*, No. 08-15-00090-CR, 2017 WL 769881, at *5-6 (Tex.App.--El Paso Feb. 28, 2017, no pet.) (mem. op., not designated for publication) (collecting cases finding such testimony to be improper bolstering).

Even ignoring the lack of constitutional objections at trial, the en masse nature of Appellant's first proffer renders improper the majority's reliance on large amounts of evidence to find reversible error.

IV. GROUND FIVE: *The majority opinion improperly found Due Process and Confrontation Clause violations in the portions of the bills of review that the majority addressed.*

The majority's explanation for why there were more than eight instances of constitutional error regarding the first bill consists of one short paragraph. *Golliday*, 2017 WL 3196479, at *9. No effort is made to explain why any individual item of the first proffer was constitutionally required to be admitted.[11]

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[11] Among the many conclusory assertions offered as a basis for finding error were:

- The trial court blocked [Appellant] from presenting evidence before the jury that supported the theory of the defense.
- [T]he trial court prevented Appellant from cross-examining [the sexual assault victim] fully.
- Appellant was not allowed to offer his reasons for the contradictions or his reasons that her testimony was unreliable.
- [Appellant] was not allowed to present his defense or to fully impeach Complainant.

Golliday, 2017 WL 3196479 at *9. Rather than explain why there was legal error, these sentences all simply repeat that Appellant was not allowed to do what he wanted to do.

Aside from there being essentially no analysis at all, this summary declaration of error invites any future defendant to invoke this opinion as requiring a trial court to allow admission of virtually any evidence that a defendant declares is needed to: (1) "fully impeach" a victim; or (2) show a victim is "unreliable."

A. *The majority opinion overlooks the problem that most of the items it concludes were constitutionally required to be admitted were hearsay.*

Despite the State's hearsay objections at trial (RR. III-91, 95) and hearsay arguments on appeal, (State's coa br. at 9, 19-21) the majority treated as a non-issue the hearsay nature of Appellant's proffered evidence in the first bill. That hearsay consisted of the out-of-court comments from (1) persons at Millwood Hospital, and (2) the sexual assault victim. In so doing, the majority erred. *Walters*, 247 S.W.3d at 219.

There is nothing categorical or arbitrary about the hearsay rules. Further, it should be noted that Appellant cannot contend that he wasn't

offering these out-of-court statements for their truth because Appellant never so informed the trial court. TEX. R. EVID. 105(b)(2). Moreover, Appellant was plainly offering these statements for their truth.

Regarding the second bill, the majority identified Rules 107 and 803(4) as solutions to the hearsay bar to finding constitutional error. *Golliday*, 2017 WL 3196479, at *9. There are any number of problems with the majority's treatment of the hearsay issue.

First, the State didn't go into the victim's full medical history and instead asked the SANE about why the victim came to the SANE. RR. III-103-04 ("[W]hat was the medical history that she told you about why was she there?"). So any claim that State broadly inquired about the victim's medical history is erroneous.

Second, Appellant's opened-the-door objection and Rule 803(4) objections related to only some of the SANE's proposed evidence. RR. III-131 (medication and herpes); RR. III-141 (mixing alcohol and medication).

Third, Rule 107 didn't require admission of the SANE proffer just because the SANE discussed the rape exam. *Sauceda v. State*, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004) ("in order to be admitted under the rule, the omitted portion of the statement must be 'on the same subject' and must be 'necessary to make it fully understood,'" quoting Rule 107).

B. *The majority opinion's unexplained finding of constitutional error seems to rest upon a belief that Appellant had a right to cast his victim as a "floozy" and a "nut," generally.*

The closest the majority opinion comes to explaining why there was a constitutional violation regarding the first proffer is to declare that Appellant was prevented from showing why the victim's "testimony was unreliable." *Golliday*, 2017 WL 3196479, at *9. If this case is not reversed, the bench and bar will be forced to wonder how there was a constitutional violation in excluding:

- "I'm a love addict and it sucks;"
- The victim said she had not accepted the fact that she had been raped;
- "Therapist stated that it sounded like patient learned to manipulate men . . . .";
- Victim believed that she was "a giant problem" to everyone;
- Victim had been assaulted by her roommate's husband, but the charges were dropped (RR. III-92);[12]
- Someone in the emergency room had given the victim Xanax for a panic attack;
- Victim was on anti-anxiety medication before, and at the time of, the alleged rape. She took Zoloft for anxiety and took it with

[12] Two things are worth noting about this topic. First, this is a different matter from the alleged accusation to the Navy discussed earlier. *See* discussion *supra* at 28-29.

Second, the majority opinion misstates the facts. The victim was asked whether charges were dropped regarding an accusation that she had been raped by her roommate's husband. RR. III-92. She denied ever making such an accusation. *Id*. The victim explained that she had accused her roommate's husband of assault. RR. III-92. There was no comment made by the victim about the charges for the assault being dropped.

alcohol. She stated outside the jury's hearing, "I'm a recovering alcoholic. I drink alcohol with everything."

- Victim had herpes during her Millwood stay and at trial.

See Golliday, 2017 WL 3196479, at *8-9.

The majority found the evidence to be constitutionally admissible on a theory of attacking the victim's general credibility as described in *Hammer v. State*, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009) and *Johnson v. State*, 490 S.W.3d 895, 909 (Tex. Crim. App. 2016). *Johnson*, however, recognizes that a "defendant does not have an absolute right to impeach the general credibility of a witness." *Johnson*, 490 S.W.3d at 910.

An attack on a witness's credibility requires that there be probative value in the evidence. A victim's past claim of sexual abuse, for example, has to be shown to be false. *Lopez v. State*, 18 S.W.3d 220, 225 (Tex. Crim. App. 2000).

Like a victim's prior claim of abuse, there is no probative value in hearsay statements (1) by the victim regarding acceptance, or (2) her being a "love addict," or (3) her being "a giant problem," or (4) the statement that someone thought the victim "had learned to manipulate men." That is, they tell the jury nothing about the victim's credibility.

Trying to apply the majority's credibility rationale to evidence such as the sexual-assault victim having herpes or she might have said that she was a "love addict" suggests that Appellant had a constitutional right to imply to the jury that the victim was a "floozy."[13] *Golliday*, 2017 WL 3196479, at *3 (Appellant's defense was consent, not promiscuity).

[13] The only other theory imaginable is that the majority regards a divorced woman having an STD as a condition -- akin to a felony conviction -- that inherently renders her less credible. An ugly notion, but no less ugly than a contention that STD evidence supports a claim of consent.

Herpes

There is no promiscuity defense in Texas. *Ray v. State*, 119 S.W.3d 454, 458 (Tex.App.--Fort Worth 2003, pet. ref'd). The majority's holding that Appellant had a right to present evidence (RR. III-93) that the victim had herpes at the time of the offense at the time of trial violates TEX. R. EVID. 412 and 608(b).[14]

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[14] Under Rule 107, the fact that the State asked about a rape exam would not make herpes evidence admissible. *Scott v. State*, No. 02-03-458-CR, 2005 WL 555278, at *1 (Tex.App.--Fort Worth Mar. 10, 2005, no pet.) (mem. op., not designated for publication) (no Rule 107 error in redacting STD from sexual assault examination, citing *West v. State*, 121 S.W.3d 95, 103 (Tex.App.--Fort Worth 2003, pet. ref'd)). The State asked the SANE about information reported by the victim concerning the sexual assault as part of obtaining a medical history examination. RR. III-103-04. The opinion identifies that act as opening the door to admission of everything that the victim told the SANE about her medical history. *Golliday*, 2017 WL 3196479 at *9. The opinion thus violates this Court's admonishment that a party invoking an opened-the-door justification "may not stray beyond the scope of the invitation." *Schutz v. State*, 957 S.W.2d 52, 71 (Tex. Crim. App. 1997) (quoting *Bush v. State*, 773 S.W.2d 297, 301 (Tex. Crim. App. 1989)). The opinion transforms this tiny opening regarding information about the sexual assault into a massive portal concerning every medical issue the victim faced. The trial court was entitled to find that this failed the Rule 107 test as Appellant failed to show that it is "on the same subject" and "necessary to make it fully understood." *Sauceda v. State*, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004) (op. on reh'g) (quoting Tex. R. Evid. 107). Finally, it is important to keep in mind that this rule-of-evidence issue was not Appellant's issue on appeal or the basis for the reversal. The majority just offered this discussion as a means to deal with a hearsay bar to Appellant's constitutional complaint regarding the SANE proffer.

Even if the majority was wrong to say that Appellant's defense was consent, the evidence would be barred. First, even prior to the adoption of TEX. R. EVID. 412, Appellant would have needed to show that: (1) herpes could have been easily transmitted to Appellant, and (2) Appellant had not contracted herpes. *See, e.g.*

- *Smith v. State*, 737 S.W.2d 910, 914-15 (Tex.App.--Fort Worth 1987, pet. ref 'd) (victim's gonorrhea not material to a fact at issue -- no tests had been performed to determine whether defendant had gonorrhea);
- *Johnson v. State*, 651 S.W.2d 434, 436-37 (Tex.App.--Dallas 1983, no pet.) (victim's STD properly excluded where defendant failed "to show that he was in fact clear of the disease").

After the adoption of Rule 412,[15] Appellant needed to establish that

[15] The version of the Rape Shield statute in effect when *Smith* was decided, Tex. Penal Code § 22.065 (repealed), was more similar to Rule 403 than to the present Rule 412. *See Pinson v. State,* 778 S.W.2d 91, 92 n.1 (Tex. Crim. App. 1989).

the STD evidence fit under Rule 412(b)(2)(C)'s "motive of bias" rationale. *Cantu v. State*, No. 13-14-00014-CR, 2014 WL 3889108, at *3 (Tex.App.--Corpus Christi Aug. 7, 2014, no pet.) (mem. op., not designated for publication); *see also Hawkins v. State*, No. 03-95-00690-CR, 1997 WL 366788, at *1 (Tex.App.--Austin July 3, 1997, pet. ref'd) (not designated for publication) (evidence that victim had herpes properly excluded under Rule 412). Appellant made no such showing. *See State v. Ozuna*, 316 P.3d 109, 114-16 (Id. Ct. App. 2013) (evidence that victim had an STD was properly barred under Rule 412 and exclusion did not violate Sixth Amendment); *State v. Knox*, 536 N.W.2d 735, 739-41 (Iowa 1995) (evidence that victim had chlamydia was properly excluded under Rule 412 and did not violate federal due process).

While the majority never explains why it believes that the trial court was constitutionally required to admit evidence that the victim had herpes at the time of the offense, only two equally awful theories seem possible in light of the majority's recognition that Appellant's defense did

not dispute that he had sex with the victim. The majority believes that the evidence was constitutionally required to be admitted either because (1) evidence that the victim had had sex before made her consent more likely, or (2) evidence that the victim had an STD made her inherently less credible. Rule 412 was created to uproot such notions and this Court should repudiate them. Still more questionable is the opinion's holding that Appellant had a right to present evidence that the victim had herpes at the time of trial.

The victim's love addict comment: evidence of sex addiction (which is not present here) is not admissible.

Even in the case of sex addiction, it would not be proper, in light of TEX. R. EVID. 412, to admit such evidence for impeachment. *Orellana v. State*, No. 11-03-00101-CR, 2005 WL 181666, at *1 (Tex.App.--Eastland Jan. 20, 2005, no pet.) (mem. op., not designated for publication) (in sexual assault trial, trial court properly excluded evidence that victim was prostitute). In this regard it should be noted that Rule 412(b)(2)(B)

contains a vehicle for evidence that "concerns past sexual behavior with the defendant and is offered by the defendant to prove consent." TEX. R. EVID. 412(b)(2)(B) (emphasis added). The opinion in the present case implicitly transforms Rule 412(b)(2)(B)'s opportunity to prove consent into all prior sex with anyone.

The opinion thus represents a blow to Rule 412. *See* Newell H. Blakely, *Article IV: Relevancy and Its Limits*, 30 HOUS. L. REV. 281, 485 (1993) (criticizing *Chew v. State*, 804 S.W.2d 633, 638 (Tex.App.-- San Antonio 1991, pet. ref'd). As Professor Blakely noted "It is precisely this type of character assassination that Rule 412 was intended to prevent." *Id.* Part of the function of Rule 412 is to combat the sexual stereotyping of victims, "i.e., to prevent the jury from subverting the substantive law of rape by making the guilt of the defendant turn on the jury's assessment of the moral worth of the victim." Charles Alan Wright & Kenneth W. Graham, Fed. Prac. & Proc. Evid. § 5384 at 544 (1st ed. 1980) (emphasis added); *see* FED. R. EVID. 412 Advisory Committee's note to the 1994

amendments ("The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.").

The victim was not alleged to have stated that the she was a sex addict.

The allegation was not that the victim had said that she was a sex addict; rather, the claim was that she said that she was a love addict. RR. III-90-91. The trial court was entitled to find that being a "love addict" did not impeach the victim's testimony that she did not consent to sex with Appellant. The trial court could construe "love addict" to relate to fantasies or to romance. Either interpretation should be covered by Rule 412.

Rule 412 is triggered by evidence of "sexual behavior." TEX. R. EVID. 412(a). "Sexual behavior" is intended to have broad scope:

> Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual

> intercourse or sexual contact. See, e.g., United States v. Galloway, 937 F.2d 542 (10th Cir.1991), cert. denied, 506 U.S. 957, 113 S.Ct. 418, 121 L.Ed.2d 341 (1992) (use of contraceptives inadmissible since use implies sexual activity); United States v. One Feather, 702 F.2d 736 (8th Cir.1983) (birth of an illegitimate child inadmissible); State v. Carmichael, 240 Kan. 149, 727 P.2d 918, 925 (Kan.1986) (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies of dreams. See 23 C. Wright and K. Graham, Jr., Federal Practice and Procedure, § 5384 at p. 548, 727 P.2d 918 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").

FED. R. EVID. 412 Advisory Committee's notes to 1994 amendments, subdiv. (a); *see also United States v. Ogden*, 685 F.3d 600, 605 (6th Cir. 2012) (affirming exclusion of online chat logs indicating that child victim sent explicit images of herself to other men because such evidence was barred under Rule 412); Peter T. Hoffman, Texas Rules of Evidence Handbook at 366 (9th ed. 2009) (The term "sexual behavior" includes "activities that imply sexual intercourse or sexual contact.").

Out-of-court accusation from unnamed person that victim had learned to manipulate men

Whether the victim "manipulates" men is plainly irrelevant. *Tollett v. State*, 422 S.W.3d 886, 893 (Tex.App.--Houston [14th Dist.] 2014, pet. ref'd) (no constitutional right to cross examine officer concerning his misbehavior six years earlier in a different matter: "Appellant's purpose for presenting this evidence was general character assassination, which Rule 608(b) prohibits.").

Appellant attempted to impeach the victim with an opinion or accusation from someone at Millwood Hospital that the victim has learned how to manipulate men. RR. III-88. The victim denied the accusation. RR. III-89. The trial court initially overruled the State's objection to the manipulates-men evidence. RR. III-89. It was only when Appellant presented his proffer, en masse, that the trial court sustained the State's objection to the entire proffer. RR. III-95. As discussed earlier, the en masse nature of the proffer should have foreclosed any complaint about this item.

Furthermore, evidence that the victim has a history of manipulating men is not proper impeachment. Such an attempt violates Rules 404 and 608. *See Luvano v. State*, No.11-14-00122-CR, 2016 WL 1725455, at *6-7 (Tex.App.--Eastland Apr. 21, 2016, no pet.) (mem. op., not designated for publication) (medical records, including an assessment that victim tries to "manipulate the situation," were properly excluded as unreliable and more unfairly prejudicial than probative). The trial court was also entitled to find that the accusation was not shown to be reliable and was unfairly prejudicial. *Id.*

Prior accusation of assault and "acceptance"

The victim's report that she had been previously assaulted by her roommate's husband was not admissible as there was no showing that this accusation was false. *Lopez*, 18 S.W.3d at 226. *See* discussion *supra* at 29-30, 39.

The majority's implication that the victim's possible statement about a stage of grief, (victim might have once said that she "not really completely accepted the fact" that she was raped, RR. III-87) was required to be admitted because it could be cast as a denial of rape, is akin to a claim that a victim's prior accusation is always admissible because it can be cast as false.[16] Moreover, the trial court was entitled to find that the victim could not be impeached with evidence that she had struggled with coming to terms with being sexually assaulted. *Cf. United States v. Barry*, No. 201500064, 2016 WL 6426695, at *9 (N-M. Ct. Crim. App. Oct. 31, 2016) (not published) (counseling notes were not improperly kept from defense: victim coming to terms with having been raped was not inconsistent with victim's rape outcry), *review granted on other grounds*, 77 M.J. 118 (C.A.A.F. 2017).

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[16] The State uses the word "implication" because the State can imagine no other theory – regarding the "acceptance" evidence -- that could underlie the opinion's nebulous declarations of error. *See* discussion *supra* at n.11.

Anxiety diagnosis and medication evidence

According to Appellant's counsel at trial, the victim's diagnosis was "anxiety." RR. III-143; *see also* RR. III-93 (victim testifies that she thinks she told SANE she was suffering from anxiety). A diagnosis of "anxiety" presents no basis for a conclusion that the victim's perception or recall was distorted. *See United States v. Georgiou*, 777 F.3d 125, 140-41 (3d Cir. 2015) (fact that witness "had "been diagnosed in the past with Anxiety Disorder, Panic Disorder and Substance Abuse Disorder" was not favorable evidence); *United States v. Hargrove*, 382 Fed. App'x 765, 776 (10th Cir. 2010) (unpublished opinion) ("We have not discovered a single case in which a witness'[s] credibility was called into question on account of an anxiety disorder."), *cert. denied*, 562 U.S. 1290 (2011).

This Court requires that a nexus be shown between a psychiatric diagnosis and the witness's ability to observe and recall events. *Virts v. State*, 739 S.W.2d 25, 30 (Tex. Crim. App. 1987) ("[T]he mere fact that the State's testifying witness has in the recent past suffered or received

treatment for a mental illness or disturbance does not, for this reason alone, cause this kind of evidence to become admissible impeachment evidence."); *Scott v. State*, 162 S.W.3d 397, 401-02 (Tex.App.--Beaumont 2005, pet. ref'd) (upholding limitation of cross-examination evidence where it didn't show witness's mental illness affected his perception of events at issue); *see also Lagrone v. State*, 942 S.W.2d 602, 613 (Tex. Crim. App. 1997) (party wishing to impeach witness with evidence of drug abuse must show that witness's ability to observe was impaired at time of crime); *United States v. Jimenez*, 256 F.3d 330, 344 (5th Cir. 2001) ("For witnesses whose mental history is less severe [than schizophrenia or psychosis], district courts are permitted greater latitude in excluding records and limiting cross-examination.").

The opinion in the present case makes no pretense of demonstrating that the victim's "anxiety" diagnosis impacted her ability to observe and recall the sexual assault. In these circumstances, the

opinion can thus be cited to stand for the proposition that all recent psychiatric diagnoses are impeaching.

There was no expert evidence to support a claim that medication distorted the victim's perception or recall. *Layton v. State*, 280 S.W.3d 235, 241-42 (Tex. Crim. App. 2009) (when the State charged the defendant with driving while intoxicated and limited the method of intoxication "by reason of the introduction of alcohol into the body," evidence that the defendant took prescription medications more than 12 hours before driving was irrelevant without expert testimony explaining that the medications would have had an effect on the defendant's alcohol intoxication; "a lay juror is not in a position to determine whether Xanax and Valium, taken more than 12 hours before arrest, would have any effect on Appellant's intoxication").

Moreover, the medication testimony was tied together in an en masse offer with inadmissible evidence.

Alcoholism evidence was properly excluded as cumulative

The victim testified to the jury that before the offense she began drinking wine when she got home. RR. III-38-39. She then went out to a bar to drink. RR. III-40. She came home and drank some more. RR. III-40-41. The victim agreed that she was intoxicated. RR. III-41. Appellant's desire to present evidence that the victim was an alcoholic (RR. III-94) was properly prevented as needlessly cumulative. *Lane v. State*, No. 10-15-00036-CR, 2015 WL 9256988, at *6 (Tex.App.--Waco Dec. 17, 2015, pet. ref'd) (more evidence of victim engaging in prostitution was properly excluded as cumulative, citing *e.g. Hodge v. State*, 631 S.W.2d 754, 758 (Tex. Crim. App. [Panel Op.] 1982)).

C. *The SANE's voir dire*

As mentioned, the majority opinion provides no real explanation for why there is constitutional error regarding the exclusion of the SANE's testimony. The SANE proffer consisted primarily of: (1) the victim's statement that she takes Xanax and Zoloft; (2) an opinion about the

effects of mixing medications with alcohol; (3) the victim's report of suffering from anxiety; and (4) the victim's report of suffering from herpes. RR. III-135, 138, 139.[17] The State has already addressed the matters of herpes and anxiety. *See* discussion *supra* at 41-42.

The trial court had ample basis to find that the SANE was not qualified to offer an opinion on the effects of mixing drugs and alcohol.

The majority opinion's discussion of medication side effects and interaction with alcohol ignores the trial court's ruling that the SANE was not qualified to provide such evidence. RR. III-134 ("THE COURT: I don't think we have any medical expert testimony that would establish that link at this point."). It also ignores the State's trial objection that the SANE was not qualified, RR. III-141 and the State's argument on appeal. State's br. coa at 48-49.

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[17] Also included in the same proffer that the majority opinion held was constitutionally required to be admitted was evidence that the SANE: (1) treated the victim with a "pregnancy prophylaxis;" and (2) didn't know about warnings for Xanax and Zoloft use. RR. III-136-37, 139.

A nurse is not qualified to testify concerning side effects of drugs simply because she is a nurse. *Johnson v. State*, 375 S.W.3d 12, 30 (Ark. Ct. App. 2010) (trial court properly refused to allow nurse to testify concerning possible side effects of hydrocodone). Instead, Appellant had an obligation to establish that the SANE was an expert in the side effects of drugs. It is doubtful that a nurse could ever be shown to have such expertise. *Smith v. Christus Saint Michaels Health Sys.*, 496 Fed. App'x 468, 474 (5th Cir. 2012) (magistrate did not err in preventing nurse from testifying about side effects of drugs); *Cisneros v. Dham*, No. 1:11-CV-01297-LJO, 2015 WL 521292, at *2 n.2 (E.D. Cal. Feb. 9, 2015) (not published) (because nurse has not been qualified as a medical expert under FED. R. EVID. 702, she cannot give testimony on side effects of drugs); *Smith v. Christus Health Ark-La-Tex*, No. 5:10CV34, 2011 WL 13217905, at *5 (E.D. Tex. Apr. 25, 2011) (not published) ("Given [Nurse] Griffith's lack of expertise in toxicology and pharmacology, and given the [Texas] legal prohibition against her prescribing medications, the Court

agrees with Defendant that Plaintiffs have failed to demonstrate by a preponderance of the evidence that Griffith possesses the necessary qualifications to testify regarding the likely side effects of those medications.").

Whether it could be possible to establish that a nurse had the kind of expertise required to offer the opinions at issue should be a moot issue here. Appellant did not carry his burden to show that the SANE was qualified to offer opinions on the side effects of drugs, or of mixing drugs and alcohol. *See* RR. III-136-37 (nurse: (1) had never heard of the term "polysubstance amnesia"; (2) has never seen a warning label on Xanax or Zoloft; and (3) is not aware of patients being warned not to mix alcohol with Xanax or Zoloft). While the SANE stated that mixing benzodiazepine with alcohol can cause "memory distortion" and potentially can cause blackouts, she failed to provide any basis justifying such expert opinion testimony. RR. III-136. Appellant provided the trial court with no basis to support impeachment of the victim on the basis of

her medication. *See Morgan v. State*, 785 S.E.2d 667, 670 (Ga. Ct. App. 2016) (where defendant did not attempt to qualify SANE nurse as an expert on the side effects of psychiatric medication, defendant had no person who could offer such testimony).

Indeed, the SANE admitted that she lacked the expertise to provide an opinion on mixing drugs and alcohol, RR. III-135,[18] and the State objected on that basis. RR. III-141. The trial court's discretion to exclude the SANE's opinions, as lacking the required expertise to support it, has never been challenged on appeal by Appellant or by the majority opinion.

D. *The majority opinion accords no authority to the trial court to prevent harassment, prejudice and confusion of the issues.*

The Sixth Amendment doesn't prevent a trial judge from limiting cross-examination on concerns about, among other things, harassment, prejudice, confusion of the issues or interrogation that is repetitive or

[18] "[Appellant]: . . . . In your expertise, would -- do you know the effects of mixing alcohol and Xanax? A. No, I do not. From a biochemical reaction, no, I do not." RR. III-135.

only marginally relevant. *Hammer*, 296 S.W.3d at 561 n.7. In *Johnson*, this Court implied that a trial court's expression of concern about harassment is a precondition to sustaining an exclusion of evidence on that basis. *Johnson*, 490 S.W.3d at 911. Such a notion is contrary to the well-settled doctrine that a trial court must be affirmed even if he is right for the wrong reason. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009). In the present case, the fact that the trial court didn't discuss harassment, in excluding Appellant's evidence, is only further evidence that there wasn't a constitutional objection presented to the trial court. RR. II-95, 142.

The victim admitted to the jury that: (1) she was intoxicated, RR. III-41; (2) she had flirted with Appellant, RR. III-45; and (3) she had a poor memory of the events. RR. III-52-53. The victim's memory, however, was rendered largely superfluous by the victim's contemporaneous 9-1-1 call, SX-30, and her report to the SANE. RR. III-104-06. In that light, Appellant's interest in the victim's mental-

health history and the causes of her memory problems are shown to be little more than attempts to unfairly bias the jury against the victim.

Few victims will be free of having said odd things or (as in the case of the "manipulation" comment) having had unpleasant things said about them at some point in their pasts. Sexual assault trials should not devolve into litigating whether such past statements disqualify a victim from seeking justice.

CONCLUSION

The majority opinion, in finding that Appellant's constitutional complaints were preserved, fails to comply with this Court's binding precedent.

The majority opinion's handling of the merits of Appellant's complaint is equally flawed. The majority opinion effectively creates a

rule that a defendant has a constitutional right to introduce anything that makes a victim look bad.

PRAYER

The State prays that the court of appeals' judgment be reversed and that the cause then be remanded to the court of appeals for disposition of Appellant's remaining issues (Issues Three, Four and Five).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

There are 10,150 words in the portions of the document covered by TEX. R. APP. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

A copy of the State's Brief on the Merits has been electronically sent to counsel for Appellant Joshua Golliday, Mr. Don Hase, at DHnotices@ballhase.com, and the State Prosecuting Attorney, Ms. Stacey M. Soule, State Prosecuting Attorney, at information@spa.texas.gov, on the 23rd day of March 2018.

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